

Randall J. Shepherd

Complainant

v.

Pines Motel, Cave Lounge  
and Eldon Dodds

Respondent

Date of Decision: June 1, 1993

Before: Ontario Board of Inquiry, George N. Carter

Appearances by: Anthony D. Griffin, Counsel for the Ontario Human Rights Commission

Eldon Dodds, for himself and Pines Motel, Cave Lounge

- Cases Cited:
1. Janssen v. Ontario (Milk Marketing Board) (1991) C.H.R.R. 13, D 400
  2. O'Malley v. Simpson-Sears Ltd., (1986) 7 C.H.R.R. D/3102
  3. Cameron v. Nel-Gor Castle Nursing Home, (1985) 5 C.H.R.R. D/2170
  4. Piazza v. Airport Taxicab (Milton) Association (1989) 10 C.H.R.R.D/16347
  5. Parks v. Christian Horizons (no. 2), (1992) 16 C.H.R.R. D/171
  6. McKee v. Hayes-Dana Inc., (1992) 16 C.H.R.R. D/179
  7. Foster-Wheeler Ltd. v. Ontario Human Rights Commission, (1987) 8 C.H.R.R. D/4179

Legislation Cited: Human Rights Code, R.S.O. 1990,  
C. H 19, as amended  
S. 5  
S. 11

[1] On March 15, 1993, I was appointed to serve as a Board of Inquiry by the Minister of Citizenship pursuant to the Human Rights Code, R.S.O. 1990, c. H 19, as amended to hear the complaint of Randall J. Shepherd against Pines Motel, Cave Lounge and Eldon Dodds dated

July 26, 1991 alleging discrimination in employment on the basis of creed.

### The Facts

[2] Mr. Randall (Randy) Shepherd, age 43, married and the father of two children, lives in Trenton Ontario where he works as a bartender as he has done since 1973. In November 1987, he began work at the Pines Motel, Cave Lounge then owned by one Irene Bigley who sold the business to Mr. Eldon Dodds in December of 1990. Under the Bigley ownership and management none of the problems that form Mr. Shepherd's complaint of creed discrimination arose. During that time, he was not required to work on Sundays.

[3] Mr. Shepherd is a practicing Roman Catholic and a member of the St. Peter's Congregation in Trenton which he and his family attend regularly on Sundays and holidays of obligation. His first communion, confirmation, and marriage were at St. Peter's. Out of deference to his religious scruples, he has never worked on Sundays, believing Sundays should be reserved for devotion.

[4] When Mr. Dodds took over the management of the motel and bar, Mr Shepherd worked as a bartender from 6:00 p.m. until 2:00 a.m. on Tuesdays through Fridays and from 11:00 a.m. until 6:00 p.m. on Saturdays as had been established under the Bigley regime. In the latter part of March 1991, Mr. Dodds posted a time sheet for all employees, including Mr. Shepherd then head bartender, requiring Mr. Shepherd to work on Sunday, April 7, 1991.

[5]           The posting of the time sheet precipitated a discussion in the stock room between Mr. Shepherd and Mr. Dodds wherein Mr. Shepherd refused to work on Sundays and Mr. Dodds insisted that he would, leaving the matter temporarily unresolved. Shortly thereafter, there was another discussion in the kitchen of the Lounge when Mr. Dodds gave Mr. Shepherd a few days off work to reconsider his position. Mr. Dodds was upset, feeling himself pressured to choose between his job and his creed.

[6]           On Sunday, April 7, 1991, Mr. Shepherd went to 11:00 Mass as usual. He telephoned the Lounge when he arrived home from Church. He had a conversation with Mr. Dodds in which previous positions were solidified and Mr. Shepherd refused to come in to work. Mr. Dodds terminated Mr. Shepherd's employment by giving him a permanent lay-off. At the time of termination, April 7, 1991, Mr Shepherd was paid \$9.75 per hour for a two-week pay period of 74.50 hours, or \$725. gross salary every two weeks.

[7]           Mr. Shepherd immediately set out to find another position as a bartender or whatever other employment he could secure in Trenton and the surrounding area. The recession made his job search onerous and unfruitful. Eventually by January 14, 1992, he obtained the bartender position he now holds at the Cambridge House, working the same shift as he had at Mr. Dodds establishment -- but not on Sundays.

[8]           After his search for a bartending job proved fruitless, Mr. Shepherd canvassed the factories in the Trenton area. In September of 1991 he got a factory job at Stearns and Fosters pushing buttons and writing down information. This job lasted two days. This job made

him nervous and sick. He sought medical advice and was prescribed anti-depressants. I find that Mr. Shepherd had done all that could be required of him to find alternative employment and that his reason for not continuing at Stearn and Fosters was bona fide.

[9] The loss of his employment at the Cave Lounge put Mr. Shepherd and his family under extreme stress. He suffered anxiety, depression, and loss of self-esteem. His situation was aggravated by the belief he had been terminated on account of his religious scruples in refusing Sunday employment. Mrs. Lorraine Shepherd, his wife of twenty-two years, corroborated his withdrawal, depression, loss of sleep, and weight loss as well. She consulted their Parish Priest for prayers and guidance to Mr. Shepherd's knowledge.

[10] Counsel for the Commission took the position that Mr. Shepherd was entitled to damages assessed at 20 weeks, from April to September of 1991, when Mr. Shepherd was employed for two days at Stearns and Fosters. The damages for loss of earnings on this basis amount to \$7,250. I find 20 weeks a reasonable compensation period.

[11] For his part, Mr. Eldon Dodds acknowledged that he is the owner and manager of the now bankrupt Pines Motel and Cave Lounge. He confirmed Mr. Shepherd's testimony as it relates to the terms of his employment. He acknowledged Mr. Shepherd was an excellent bar manager.

[12] Mr. Dodds testified that he has no animus against any religion or creed. He said that he did not know Mr. Shepherd was a Catholic or that he went to



Church on Sundays. All he claimed to have known was that Mr. Shepherd considered Sundays a family day. After dismissing Mr. Shepherd, he discovered that 90% of his employees were Catholics. Aside from Mr. Shepherd, no one complained about working on Sundays, the Lounge's busiest day. From Mr. Dodds' perspective, Mr. Shepherd was his head bartender and if Mr. Shepherd was not to work on Sundays, Mr. Dodds would be unable to take Sunday off himself. With Mr. Dodds, the issue was one of business and his personal convenience rather than religion.

[13] Mr. Dodds testified that when he took over the business, he had five full-time and three part-time staff. All but one of these staff were bartenders. He acknowledged that Mr. Shepherd was an excellent employee to be counted on to manage the bar properly in his absence. Mr. Dodds testified the bar functioned acceptably on Sundays during and after Mr. Shepherd's employment. While he would have preferred to have Mr. Shepherd on the job on the busiest day of the week, it was not essential that Mr. Shepherd work on Sundays. Several months after he dismissed Mr. Shepherd, Mr. Dodds was pleased to find a replacement bar manager whose salary was three-quarters of Mr. Shepherd's previous wage.

[14] Mr. Dodds testified that he and his business went into bankruptcy in January, 1992 and the business is in the hands of his mortgager under power-of-sale. The doors were shut on January 20, 1993. Although the number of customers increased, he stated the business failed because the purchase price was too high. This price, he explained, was based on what he now believes to be fraudulent sales records compiled by the previous owner.

[15] While I accept much of Mr. Dodds' evidence, I do not accept his evidence where it conflicts with the testimony of Mr. Shepherd. In particular, I am persuaded beyond any reasonable doubt (let alone the preponderance of the evidence or clear and convincing proof) that Mr. Shepherd made it clear to Mr. Dodds that his objection to working on Sundays was founded on religious scruples and his Catholic faith. I find that Mr. Dodds was aware of Mr. Shepherd's convictions but was indifferent to them. As Mr. Dodds put it, if Mr. Shepherd did not work Sundays, Mr. Dodds himself would be unable to take that day off. As a Mormon, Mr. Dodds said he could have observed the Sabbath any day of the week of his choosing. Mr. Dodds professed no religious conviction against working Sundays or any other day of the week.

#### The Law

[16] The Human Rights Code S. 5 (1) reads as follows:

"Every person has a right to equal treatment with respect to employment without discrimination because of . . . creed."

The The Human Rights Code S. 11 reads as follows:

"(1) A right of a person under part I as follows where a requirement qualification or factor exists that is not discrimination on a prohibited ground but that results in exclusion, restriction, or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where  
(a) the requirement qualification or factor is reasonable and bona fide in the circumstances.

(2) The . . . board of inquiry . . . shall not find that a requirement, qualification, or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating these needs considering the costs . . ."

### The Issue of Creed

[17] There can be no doubt that the Roman Catholic religion is a creed within the meaning of the Human Rights Code. The principles of this religion are formulated by Church officials and proclaimed by edict through a religious hierarchy. I am satisfied beyond a reasonable doubt that Mr. Shepherd's refusal to work on Sundays is based on a concept of the Sabbath endorsed by his Church and honestly and sincerely held by him. That other professing Catholics in Mr. Dodds' employment were willing to work on Sunday is as irrelevant as the fact Mr. Dodds' religion permitted him to pick any day of the week as his Sabbath. The purport of the Code is the protection of individuals who wish to practice their religion freely: Janssen v. Ontario (Milk Marketing Board) (1991) C.H.R.R. vol. 13, D/400, para. 22.

[18] The requirement that all employees at the Pines Motel and Cave Lounge be available for work on Sundays while neutral on its face and reasonable and bona fide in the circumstances accepting Mr. Dodds' evidence that as much as 18% of the weekly revenues were earned on Sundays, nonetheless had a disparate impact on Mr.

Shepherd. In such instances of adverse effect discrimination rationally connected to employment what is required is some measure of accommodation: O'Malley v. Simpson-Sears Ltd. (1986) 7 C.H.R.R. D/3102 and D/3107, para. 2477 (S.C.C.).

[19] The Code places the duty to accommodate in these circumstances squarely upon Mr. Dodds, the Pines Motel and Cave Lounge, short of undue hardship. The Concise Oxford dictionary defines hardship as "severe suffering or privation", and undue as "excessive or disproportionate": Janssen v. Ontario (Milk Marketing Board) para 29. Mere inconvenience and some element of disruption and expense do not constitute undue hardship. On the facts before me, there is no issue of undue hardship and the potential for disruption and expense are merely speculative. It is more probable that had a replacement bar manager assumed the Sunday shift, accommodating Mr. Shepherd's religious convictions, the firm may have profited. In this case, compliance with the Code made at least as much, if not more, economic sense -- bearing in mind that a replacement bar manager was found willing to work for 75% of Mr. Shepherd's wage and that the number of customers was increasing until some months after Mr. Shepherd was discharged. As Mr. Dodds trenchantly explained, the eventual bankruptcy of the business was unrelated to Mr. Shepherd's employment. Whether defrauded or not regarding the purchase price, Mr. Dodds was unable to discharge his debts as they came due.

[20] Mrs. Lorraine Shepherd, whose evidence I accept in its entirety, told of the stress her husband's loss of employment put on the family and their marriage. She is a Social Services Worker and Welfare Commissioner for



Lennox and Addington Social Services. She related how her husband grew increasingly remote and uncommunicative, lost weight, and fell into a severe depression. From her perspective, Mr. Shepherd thought his religion had cost him his job and financial well-being, and undermined his family life. She consulted her Parish Priest, Father Jim, for advice. She recalled her marriage vows which she considers a sacrament, in her words: "We are a union, we are a Christian family, and we are in a Christian marriage". Mr Shepherd's loss of employment had consequences for all the members of his family and this bore heavily on him, The Shepherd family suffered a trial of their religious convictions, a "persecution for righteousness sake", in the language of their creed. In Mrs. Shepherd's words: "It was a heavy cross to bear".

[21] The burden of proof of Creed discrimination has been met on substantially more than a balance of probabilities. It is difficult to imagine a clearer case.

### Remedies

[22] Subsection 4/(1) governs the award of monetary compensation for breaches of the Code. Subsection 4/(1) (b) entitles a board of inquiry satisfied that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 to,

(i) direct the company to make restitution including monetary compensation, for loss arising out of the infringement, and, (ii) where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award not exceeding \$10,000 for mental anguish.

[23] The objective to be achieved by an award of monetary compensation under the Code is restitution, that is, the eradication of the harmful effects of a respondent's actions on the complainant, and the placing of a complainant in the same position in which he or she would have been had his or her rights not been infringed by the respondent: Cameron v. Nel-Gor Castle Nursing Home (1984) 5 C.H.R.R. D/2170 at D/2196 para 18527. It is now a principle of human rights damage assessments that damage awards ought not to be minimal, but ought to provide true compensation for two reasons. First it is necessary to meet the objective of eradicating the harmful effects of the respondent's actions. Secondly it is necessary to give true compensation to meet the broader policy objectives of the Code and to insure that damage awards not trivialize or diminish respect for public policy declared in the Human Rights Code: Cameron v. Nel-Gor Castle Nursing Home, para. 18526.

### **Special Damages**

[24] The measure of special damages in a denial of employment opportunity cases is that amount the complainant would have earned had he or she not been denied employment: Piazza v. Airport Taxicab (Milton) Association, (1989), 10 C.H.R.R. D/6347 at D/6348, para. 45017. There is to be no deduction for receipt of unemployment or welfare benefits received by the complainant during the period of unemployment. The employer is not entitled to the benefit by having those amounts deducted from the Board of Inquiry award: Parks v. Christian Horizons (No. 2), 1992 16 C.H.R.R.D/171 at D/173 para.18.

[25] Mr. Shepherd met his duty to mitigate his damage by using reasonable diligence to find other employment: McKee v. Haynes-Dana Inc. (1992), 17 C.H.R.R. D/79 at D/84, para. 46; Cameron v. Nel-Gor Castle Nursing Home, para 18534.

[26] Because the Respondents are in company and personal bankruptcy and the business is closed, I make no order under Human Rights Code S 41(1) (a).

[27] I assess special damages at \$7250, 20 weeks at the salary Mr. Shepherd would have received had he not been forced out of his job in violation of his right to practice his creed without discrimination. Furthermore, I award interest at 7.5% per annum, based on computations appearing in The Ontario Gazette from the date of the signing of the complaint July 26, 1991.

#### General Damages

[28] Human Rights Code 5.41 (1) (b) permits compensation for loss of dignity and self-respect in light of the seriousness of the injury caused: Cameron v. Nel-Gor Castle Nursing Home, para. 18538; Foster Wheeler Ltd. v. Ontario Human Rights Commission (1987) 8 C.H.R.R. D/4179 at D/4180, para 33025.

[29] An additional component of compensation under s. 41 (1) (b) addresses the intrinsic value of the right to equality of employment opportunity. This intrinsic value is independent of the actual monetary or personal losses suffered by the complainant. The infringement of Mr. Shepherd's right to equal treatment in employment is an independent injury: Cameron v. Nel-

Gor Castle Nursing Home, para. 18539; Parks v. Christian Horizons (no. 2) para. 27.

[30] The word "wilfully" in Code 5. 41 (1) (b) means intentionally, knowingly, or deliberately: Cameron v. Nel-Gor Castle Nursing Home, para. 18545. The word "recklessly" in that same paragraph of the Code means the contravener's conduct must evidence disregard of, or indifference to, its consequences. Such conduct must be beyond mere negligence and be persistently rash, needless, or wanton: Cameron v. Nel-Gor Castle Nursing Home, para. 18546. I am satisfied beyond a reasonable doubt that Mr. Dodds' treatment of Mr. Shepherd was reckless and, on clear and convincing proof, that he acted wilfully in the sense of knowingly or deliberately.

[31] I concur with Professor Cumming that the last three lines of paragraph 41 (1) (b) of the Code support assessment of an award beyond mere compensation. Such an award may have a punitive element in instances where the respondent's conduct is either wilful or reckless and is demonstrated to have caused mental anguish: Cameron v. Nel-Gor Castle Nursing Home, para. 18561.

[32] Accordingly, I award general damages to the Complainant, Randall Shepherd for his loss of dignity and self-respect, loss of his right to freedom from discrimination in employment on account of creed, and for mental anguish in the amount of \$4000. In addition, considering all the circumstances of this exceptional case, a punitive award in the amount of \$4000, is in order as the most effective way to encourage compliance with the Code: Ontario (Human Rights Commission) v. Simpson-Sears Ltd., (1985) 7 C.H.R.R. D/3102; Cameron v. Nel-Gor Castle Nursing Home, para. 18563. As with the



special damages, interest will be assessed at 7.5% per annum commencing July 26, 1991.

### Order

[33] This Board of Inquiry, having found the Respondents Pines Motel, Cave Lounge and Eldon Dodds to have breached the Human Rights Code, R.S.O. 1991, C. H. 19 in respect of the Complainant Randall Shepherd, orders the following:

The Respondents are jointly and severally liable to pay forthwith to the complainant as follows:

- a. damages for loss of wages \$7,250;
- b. general damages in the amount of \$4000;
- c. punitive damages in the amount of \$4000;
- d. interest in respect of the total damages \$15250 at 7.5% per annum, commencing July 26, 1991.



George N. Carter

June 8, 1993

